

2007

Gloria Hayley Ashby v. Dallen Ben Ashby : Brief of Petitioner

Utah Court of Appeals

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Recommended Citation

Legal Brief, *Ashby v. Ashby*, No. 20070362 (Utah Court of Appeals, 2007).

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IN THE UTAH SUPREME COURT

GLORIA HAYLEY ASHBY,

Plaintiff and Respondent,

vs.

DALLEN BEN ASHBY,

Defendant and Petitioner.

Case No. 20080737-SC

Case No. 20070362-CA

BRIEF OF THE PETITIONER

On Writ of Certiorari from the Utah Court of Appeals, Case No. 20070362-CA,
Before Judges Bench, Billings, and Orme.

On Appeal from the Fourth District Court, Utah County, State of Utah, Case
Number 060403522, The Honorable Steven L. Hansen, Presiding.

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FILED
UTAH APPELLATE COURTS
JAN 27 2009

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STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Utah Code Annotated § 78A-3-102(3)(a).

ISSUE PRESENTED AND STANDARD OF REVIEW

Pursuant to an Order of this Court dated November 25, 2008, the Petition for Writ of Certiorari was granted as to the following issue:

“Whether the majority of the panel of the court of appeals erred in its assessment of the availability of civil claims for unjust enrichment and breach of contract in the context of the motion to dismiss filed in this case.”

Standard of Review: When exercising its certiorari jurisdiction, the Utah Supreme Court “review[s] the decision of the court of appeals, not of the trial court.” *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 350 (Utah 1997). The Supreme Court “accord[s] no particular deference to the court of appeals’ ruling; we review for legal correctness.” *Bear River Mut. Ins. Co. v. Wall*, 978 P.2d 460 (Utah 1999).

STATUTORY PROVISIONS INVOLVED

The determinative statutory provisions involved in this case are as follows:

1. Utah Code § 25-5-4(1), which states in pertinent part:
 - (1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:
 - (a) every agreement that by its terms is not to be performed within one year from the making of the agreement;
2. Utah Code § 30-3-5(8)(a)(vii), which states in pertinent part:

(8) (a) The court shall consider at least the following factors in determining alimony:

* * *

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

STATEMENT OF THE CASE AND FACTS

This case involves breach of contract and unjust enrichment claims brought by Respondent Gloria Ashby (hereafter “Wife”), against her former spouse, Petitioner Dallen Ashby (hereafter “Husband”). Wife initially raised those claims in the parties divorce action, but upon recommendation of the court commissioner and order of the Fourth Judicial District Court, they were dismissed from the divorce proceedings. (R. 46).

Wife thereafter filed a separate civil Complaint in the district court alleging breach of contract and unjust enrichment, and seeking an unspecified amount of damages. (R. 1-5). The Complaint alleged that despite the lack of a premarital agreement or formal written instrument, the parties agreed that Husband would seek a college education and then a medical degree while Wife partially supported the parties through her employment. (R. 1-5). The parties anticipated that Husband’s future income would be sufficient such that Wife could thereafter focus on being a mother and homemaker. However, the marital relationship deteriorated to the point that Wife left Husband when Husband completed medical school and was starting his internship and residency which was anticipated to last another five (5) years post medical school. *Id.* In a nutshell, Wife

argues that Husband breached the agreement of the parties and was unjustly enriched to her detriment. *Id.* No children were born as issue of the marriage.

Husband answered the Complaint and filed a Motion to Dismiss arguing that the breach of contract claim is barred by the statute of frauds and that both the breach of contract and unjust enrichment claims are barred by this Court's opinion in *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991), as well as by sound public policy. (R. 8-34). Response and reply memoranda were filed by each party respectively. (R. 35-58). The Honorable Steven L. Hansen issued a Memorandum Ruling finding in favor of the arguments propounded by Husband. (R. 61-65).

Wife subsequently appealed the ruling to the Utah Court of Appeals. Following briefing and oral arguments, the Court of Appeals found that Wife's dismissal was improper. *Ashby v. Ashby*, 2008 UT App. 254. Specifically, as to the breach of contract issue, the Court of Appeals held that although Husband raised the statute of frauds as an affirmative defense, he did not "prove 'every element necessary to establish that [defense].'" *Id.* at ¶ 10. Regarding the unjust enrichment claim, the Court of Appeals held that the district court improperly interpreted *Martinez* and stated that the marital property "theory barred by *Martinez* is not akin to the express contract or unjust enrichment claims asserted by" Wife in this case. *Ashby v. Ashby*, 2008 UT App. 254 at ¶ 14.

Husband respectfully requests this Court reverse the holding of the Court of Appeals and affirm the ruling of the Fourth District Court.

SUMMARY OF ARGUMENT

The Court of Appeals erred in reversing the district court's ruling which denied Wife's "breach of contract" and "unjust enrichment" claims which arose out of the parties' marital relationship. Wife's essential claim is that by periodically discussing their future lives before or during the marriage, the parties entered into a contract as binding and palpable as that entered into by merchants or corporations. Wife argues that Husband was unjustly enriched by her joint marital efforts in providing income and maintaining the parties' residence while he attended college and eventually medical school. Seeking contractual and quasi-contractual remedies, Wife is attempting to receive financial awards not only through alimony in their divorce action, but also through damages and/or *quantum meruit* in this alternative civil action.

Wife's breach of contract claim should be rejected because the agreement of the parties was intrinsic to the marital relationship, namely, identifying who would ultimately be the primary breadwinner and primary homemaker, and simply involved charting a course to meet those goals. The alleged "contract" did not contemplate or take into account the possibility of the breakdown of the marriage, and did not identify what could be considered breach of its terms. As such, any alleged contract between the parties fails not just because it lacks formalization, definiteness, or adequate provisions, but because it was never intended by the parties to be a formal, binding agreement, but rather an aspiration regarding their joint lives together.

Wife's action for "unjust enrichment" is merely a re-characterization of the "equitable restitution" doctrine rejected nearly eighteen years ago in *Martinez v. Martinez*. Furthermore, subsequent to the *Martinez* decision, Utah Code § 30-3-5 was

amended by the Utah Legislature to address the precise issues complained of in *Martinez*, and to give a remedy within the context of a divorce action. Thus, the current law precludes the need and the propriety for spouses to file alternative civil actions in order to be compensated for their contributions during marriage while the other spouse receives an education, and presumably, more earning potential.

The remedies which Wife seeks in this matter are poisonous to the health of marriage as an institution, would complicate already difficult divorces, and stifle judicial economy. Permitting spouses to obtain remuneration outside or in addition to the divorce action and “double-up” financial awards creates an incentive for litigation that is clearly against public policy. Moreover, the *Ashby* decision essentially creates the ability for divorcing spouses to hedge their bets by filing two separate lawsuits, thus complicating divorces and adding yet another matter on a judge’s docket. For all of the above reasons, articulated more extensively below, this Court should reverse the Court of Appeals’ ruling and uphold the district court’s dismissal of Wife’s alleged causes of action.

ARGUMENT

THE COURT OF APPEALS ERRED IN PRESERVING WIFE’S CIVIL CLAIMS AGAINST HUSBAND FOR BREACH OF CONTRACT AND UNJUST ENRICHMENT BECAUSE ABSENT CIRCUMSTANCES EXTRANEOUS TO THE MARITAL RELATIONSHIP SUCH CLAIMS ARE IMPROPER AND RECEIVE ADEQUATE TREATMENT IN A DIVORCE ACTION

This Court should hold that Wife’s Complaint fails to state a claim upon which relief may be granted by improperly alleging causes of action for “breach of contract” and “unjust enrichment.” Absent a showing that the relief sought is justified by

circumstances outside the context of the marital relationship and its attendant duties, spouses should not be permitted to file two separate civil actions. Rather, the domestic laws governing support, alimony, and property distribution are broad and flexible enough to protect a spouse who seeks equity and justice after a marriage fails despite his or her sacrifices during the marriage.

Permitting spouses to file two separate actions upon the same common nucleus of facts will undoubtedly increase litigation following the breakdown of a marriage, complicate settlement and negotiation between spouses, and increase the burden on the court system as it is forced to essentially deal with the same issues twice.

For reasons more fully articulated below, this Court should reverse the holding of the Court of Appeals and uphold the ruling of the trial court in dismissing Wife's Complaint.

A. Wife's Breach Of Contract Claim Should Not Be Recognized As A Cause Of Action Stemming From The Dissolution Of The Marriage.

Husband does not argue that spouses cannot or should not be able to enter into valid and binding contracts or agreements. There are some contracts legally prescribed for spouses such as premarital agreements, *see* U.C.A. § 30-8-3, post-marital agreements, *see D'Aston v. D'Aston*, 808 P.2d 111 (Utah App. 1990), or joint wills *see* U.C.A. § 75-2-514. However, all have the common thread of requiring a written document attendant with all the formalities necessary to bind the parties and memorialize the terms and conditions of the agreement.

Most agreements between spouses relate to decisions that are *intrinsic* and commonplace to a marital relationship such as (1) deciding how many children to have, (2) whether one or both spouses will work, or (3) where to live.

However, there are some agreements *extrinsic* to a marital relationship that spouses may enter together such as (1) a partnership or business relationship, (2) an employer-employee relationship between spouses, or (3) written financial arrangements between spouses where separate property is involved as collateral or for lending.

The facts of this case are essentially present in every marriage. Spouses routinely discuss their individual and collective employment or educational aspirations and take steps to achieve those goals. The Court of Appeals identified such an agreement between Husband and Wife, but held that Wife could still pursue a civil action against Husband outside of the divorce proceeding—seemingly ignoring that the remedy Wife seeks is specifically provided for in U.C.A. § 30-3-5(8)(a)(vii).

In the present case, there was no writing alleged and Wife’s claim is simply that Husband “requested that [she] work and support him during” his educational years. *See* Complaint, at ¶ 8. Regardless, the alleged contract in this case would likely be unenforceable due to the indefiniteness of the terms and conditions. *See Sachs v. Lesser*, 163 P.3d 662, 668 (Utah App. 2007) (“[A] contract can be enforced . . . only if the obligations of the parties are set forth with sufficient definiteness that it can be performed.”).

Numerous questions might be asked to point out the fact that the parties’ alleged contract fails for lack of definiteness: What if Husband chose to change careers? What if

he chose to work for a job that generated less income than expected? How long was Wife to work—only while Husband was in school, during his internship and/or residency, or until they had children? What was the level of income promised by Husband to ensure he met the standard of living contemplated by Wife? *See Stangl v. Todd*, 554 P.2d 1316, 1319 (Utah 1976) (“[W]here a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.”).

Interestingly, using Wife’s understanding of the parties’ agreement, Wife apparently failed to perform on the “contract” by leaving the marriage before Husband finished school and filing for divorce, herself breaching the terms. This possibility illuminates the ludicrous and undesirable consequences that would undoubtedly follow as spouses attempt to construct an alleged contract out of their relationship and use the legal system to accuse the other of breaching in an effort to obtain damages.

Utah case law has specifically dealt with claims brought by a divorcing party who seeks a financial award outside the context of alimony. In *Martinez v. Martinez*, the Utah Supreme Court held that a newly fashioned remedy called “equitable restitution” was unsustainable in the context of a divorce action. 818 P.2d 538 (Utah 1991). In that case, the Martinez’s had been married for fifteen years, had three children, and put Mr. Martinez through medical school before filing for divorce. *Id.* at 539. At trial, Ms. Martinez was awarded child support, alimony, and other insurance benefits, but she appealed on grounds that the awards were inadequate in total. *Id.*

The Court of Appeals agreed with Ms. Martinez and adjusted the amounts of support and tax exemptions in favor of Ms. Martinez. *Id.* However, the Court of Appeals also believed that Ms. Martinez should be awarded further compensation for her contribution while Mr. Martinez attended medical school. *Id.* Bound by precedent that rejected treating advanced degrees as marital property, the Court of Appeals created a new type of property interest called “equitable restitution.” *Id.* at 539-40.

On review, the Utah Supreme Court rejected the doctrine of equitable restitution for three main reasons: (1) the doctrine improperly treated marriage as a venture akin to a commercial partnership [the contract claim], *id* at 540-41, (2) an award of equitable restitution would be extremely speculative [the “indefiniteness” defense], *id* at 541, and (3) the concept of equitable restitution was indistinguishable from granting Ms. Martinez a property interest in her husband’s medical degree [the unjust enrichment claim]. *Id.*

Particularly relevant in the context of Wife’s “breach of contract” claim is the *Martinez* court’s first reason for disposing of the alternative relief sought—namely, that marriage and its dissolution should not be treated like a commercial partnership loaded with contracts and economic agreements. As argued more extensively below, Wife’s breach of contract claim was properly dismissed not only because of the *Martinez* decision, but because of the undesirable consequences that would flow from granting a remedy that tends to debase and de-sanctify marriage as opposed to strengthening and supporting marriage.

B. Wife’s Unjust Enrichment Claim Is A Re-characterization Of The “Equitable Restitution” Issue Identified And Rejected In *Martinez v. Martinez* And Later

Addressed By The State Legislature In Amending Utah Code § 30-3-5(8)(a)(vii).

The district court properly held in its ruling below that the settled law in this area precludes a quasi-contractual remedy. The Utah Supreme Court’s decision in *Martinez*, which overturned the Court of Appeal’s fashioning of a remedy called “equitable restitution,” prevents a court from awarding a divorcing party financial support beyond the confines of alimony. 818 P.2d 538.

Furthermore, only a few years following the *Martinez* decision, Utah Code § 30-3-5 was amended to allow a party to address in a divorce action the precise concerns Wife raises in her Complaint. Thus, not only does Wife’s argument fail under well-settled case law, there is also no need for her to have filed this alternative civil action to be made whole.

1. The Utah Supreme Court has rejected quasi-contractual remedies in the context of marriage.

Because Wife has not pleaded the existence of a written contract, and especially under her claim for unjust enrichment, her arguments are essentially the type resolved in the *Martinez* case, and should be disposed of accordingly.

As noted above, in *Martinez* the Utah Supreme Court rejected the “equitable restitution” remedy on three grounds: (1) the doctrine improperly treated marriage as a venture akin to a commercial partnership [the contract claim], 818 P.2d at 540-41, (2) an award of equitable restitution would be extremely speculative [the “indefiniteness” defense], *id* at 541, and (3) the concept of equitable restitution was indistinguishable from

granting Ms. Martinez a property interest in her husband's medical degree [the unjust enrichment claim]. *Id.* Ms. Martinez's claim that remedies available under Utah Code § 30-3-5 were insufficient was also rejected by the court. *Id.* at 542. It is noteworthy that at the time *Martinez* was decided, that statute was not as favorable as it is currently for individuals in Ms. Martinez and Wife's circumstances, yet the majority found it adequate nonetheless.

The ultimate conclusion of the *Martinez* court was that "if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial court to make a compensating adjustment in dividing the marital property and awarding alimony," not through alternative civil remedies outside the divorce context. *Id.* Ms. Martinez candidly admitted, as has Wife herein, that the reason for seeking such a unique remedy was to obtain a "nonterminable interest, unlike alimony, which ordinarily terminates upon remarriage" or cohabitation and cannot exceed the length of the marriage except in extraordinary circumstances. *Id.* at 540; *see also* U.C.A. § 30-3-5(8)(h), (9), (10). Despite the fact that Wife has alleged breach of contract in this case, a claim not raised in *Martinez*, without a premarital agreement or other formal contract she is essentially left to rely on the same claim in *Martinez*, namely, that she should be equitably compensated for her sacrifices and efforts during the term of the parties' marriage.

The *Martinez* case stands to protect the exploitation and disintegration of the marriage relationship by preventing it from being viewed primarily as an economic joint venture. Notwithstanding that bar, Wife is not without remedy—Utah Code § 30-3-

5(8)(a)(vii) requires a court to consider all of the circumstances pleaded by Wife and to award alimony accordingly. Wife, however, seeks an extraordinary remedy herein without precedent and without proper legal grounds.

Other jurisdictions have dealt with similar questions. In *Pyeatte v. Pyeatte*, 661 P.2d 196 (Ariz. Ct. App. 1983), a divorcing wife did not seek spousal support at trial. *Id.* at 199. Her claim of restitution for unjust enrichment was based purely upon the fact that she worked during the husband's first two years of law school, with his third year financed by savings that she largely contributed to. *Id.* Hence, the husband received a free education at the expense of the wife. The court was careful to distinguish that

[w]here both spouses perform the usual and incidental activities of the marital relationship, upon dissolution there can be no restitution for performance of these activities. Where, however, the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution, the remedy of restitution is appropriate.

Id. at 203. It is also noteworthy that the *Pyeatte* court rejected Mrs. Pyeatte's "breach of contract" claim due to the indefiniteness of terms without a writing. *Id.* at 200.

In *Kuder v. Schroeder*, 110 N.C. App. 355, 430 S.E.2d 271 (N.C. App. 1993), wife asserted claims for divorce, child support, alimony, and raised additional claims for breach of contract and unjust enrichment. During the marriage, wife agreed to work and provide the income for the family while husband completed his undergraduate, Master, and law degrees. *Id.* at 356-57. Wife asserted that the agreement between the parties was that upon his employment after graduation she would devote herself full-time to being a wife and mother. *Id.* However, only three months after obtaining employment, husband

separated from wife. *Id.* Wife contended that the parties’ agreement asserted in her complaint was valid and binding, affording her damages upon breach. *Id.* at 357.

The trial court had dismissed the breach of contract and unjust enrichment claims on grounds that she had failed to state a claim upon which relief could be granted. *Id.* On appeal, the court sympathized with wife’s condition, but stated that under North Carolina law there exists a “personal duty of each spouse to support the other, a duty arising from the marital relationship, and carrying with it the corollary right to support from the other spouse.” *Id.* In other words, because unjust enrichment does not apply in circumstances where there is a pre-existing duty or obligation, wife could not seek later to be compensated for her efforts during the marriage. *Id.* at 364 (Wynn, J. concurring).

In the present matter, while Wife contributed to the household expenses during the parties’ marriage by working. Husband also contributed to the household expenses, although to a lesser degree, by working and through the acquisition of student loans. Husband is solely responsible for the repayment of all his student loans. Wife did not directly contribute to his direct educational costs such as tuition and fees. These were paid by Husband’s student loans—for which he is solely responsible. There is no “free education” for Husband as there was in *Pyeatte*. Thus, *Pyeatte* does not provide enough persuasion for this Court to rule in clear contradiction to *Martinez* given the unique facts under which the wife in that case prevailed.

Granting that Wife conferred some benefit to Husband by working while he attended school, the equitable manner to compensate her is by viewing her actions as providing income, domestic assistance, and other services. The value of such services is

somewhat ascertainable, but would need to be offset by Husband's corollary duties and use of student loans which provided for the benefit of Wife, otherwise the unjust enrichment would flow the other direction.

2. Utah Code § 30-3-5(8)(a)(vii) specifically provides the relief sought for by Wife within a divorce case, thus precluding the need to seek alternative civil remedies.

Justice Durham's dissenting opinion in *Martinez* recognized the unsettling reality that at that time of the *Martinez* case there was no remedy for a spouse who had been "investing" time, labor, earnings, and postponed improvements in standard of living for the long-term benefit of the marital community . . . before the investment has 'paid off.'" *Martinez*, 818 P.2d at 544.

In Justice Durham's dissenting opinion in the *Martinez* case, she called for "a new and more flexible theory of alimony" which was answered a few years later when the Utah Legislature addressed this issue and changed the alimony statute and Utah Code § 30-3-5(8)(a)(vii) was enacted to specifically provide relief in the context of alimony for spouses similarly situated to Ms. Martinez and Wife herein.

Specifically, the statute currently requires a court to consider "whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage." U.C.A. § 30-3-5(8)(a)(vii). The intent and benefit of this statutory requirement appears to be two-fold: first, the spouse who contributed to the other's education or earning potential is given the opportunity to receive an increased support

award, be it temporary, rehabilitative, or permanent alimony, in order to recoup any lost opportunities the spouse may have sacrificed for the benefit of the marital community; second, the statute permits an alimony award to take into account the contributions of the spouse and to provide a type of “compensation” that is not punitive or speculative in nature, yet gives an equitable award that is just for both parties.

Wife claims that through her joint efforts in the marriage she conferred a substantial benefit on Husband while earning his degrees. Although Wife does not state it outright, her claim is essentially that her contributions to Husband while he attended his schooling gives her an interest in his degrees (or income derived therefrom), and should be considered marital property subject to division.

Utah courts have clearly ruled that “an advanced degree is or confers an intangible right which, because of its character, cannot be properly characterized as property subject to division between the spouses.” *Peterson v. Peterson*, 737 P.2d 237, 241 (Utah App. 1987); *see also Martinez*, 818 P.2d at 541. In *Peterson*, upon divorce after twenty years of marriage the wife, who had supported her husband during his medical training both financially and otherwise, was awarded a \$120,000 lump sum property award, in addition to permanent alimony, as her portion of the interest in husband’s medical degree. 737 P.2d at 238. The appeals court agreed with the husband that the award of “his” medical degree was impermissible because such could not be properly characterized as marital property.

Particularly relevant to the case at bar, the *Peterson* court stated that when

divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work a hardship [on the spouse who supported the other]. . . . Nonetheless, such a spouse is typically not remote in time from his or her previous education and is otherwise better able to adjust and to acquire comparable skills, given the opportunity and funding. In such cases, alimony analysis must become more creative to achieve fairness, and an award of ‘rehabilitative’ or ‘reimbursement’ alimony, not terminable upon remarriage, may be appropriate.

Id. at 242 n.4. It should be noted that four years later, the *Martinez* decision further solidified the impropriety of seeking financial support upon divorce outside of the alimony context. *See* section B1 above for greater treatment of *Martinez*.

In *Sorenson v. Sorenson*, 839 P.2d 774 (Utah 1992), the Utah Supreme Court recounted the case history against treating personal degrees as marital property and accordingly rejected the wife’s argument that the goodwill and reputation of the husband’s dental practice was a marital asset subject to division. In particular, the court stated that “[r]equiring plaintiff to divide with his wife the value of his reputation would not be an ‘equitable division,’ which is required by our statute, but would constitute ‘double counting,’ which is condemned in property division cases.” *Id.* at 776. The court astutely noted that “the similarities [between a degreeholder and a shareholder] compel analogous treatment in a divorce setting . . . [that] the ‘asset’ involved is not salable and had a computable value to the individual only to the extent that it promises increased future earnings.” *Id.* at 777 (*quoting Holbrook v. Holbrook*, 309 N.W. 2d 343, 354-55 (Wis. Ct. App. 1981)).

The common thread of reason that permeates this area of divorce is that a party’s advanced degree or speculative earning potential is not marital property subject to

division. Alternative civil proceedings that would allow a “double reward” to a spouse are clearly inequitable and improper given the availability for a spouse to seek “financial justice” through Utah Code § 30-3-5(8)(a)(vii).

In the present case, the parties both currently make approximately the same level of income and will continue to do so until Husband finishes his residency requirements in approximately two years. The parties had no minor children together and are still young, both in their early thirties. Wife’s major argument is that because the parties were married a little over eight years, her alimony award is inequitably limited to the short duration of the marriage and to Husband’s current financial status which mirrors her own, and is expected to be so for another four to five years. However, a district court may properly take all these considerations into account, including the fact that Wife assisted Husband while earning his degrees, and can determine an equitable alimony award that may seek to rehabilitate her own educational opportunities, grant a lump-sum payment, or provide for payments that increase over time, etc. In other words, Wife can be made whole through the divorce action. An alternative award of damages or restitution is speculative at best and permits the “punishment” of a spouse.

Thus, the Court of Appeal’s holding should be reversed because Wife’s cause of action for “unjust enrichment” is not recognized, and should not be recognized, under the Utah law, and impermissibly strays from the divorce context that can provide full equity and justice.

C. Utah's Strong Public Policy To Protect The Institution Of Marriage And Preserve Judicial Economy Would Be Strengthened By Reversing The Court Of Appeals Holding.

The foregoing analysis and discussion contained herein exemplifies the type of degradation marriage will be subject to should this Court permit Wife's claims to proceed to trial. Marriage is a union that is unlike other commercial partnerships or ventures. The closeness and unity of purpose along with mutual and voluntary sacrifices and contributions performed in a marriage cannot be adequately contained, protected, or described by contract law principles. Though married parties are permitted to enter into valid contracts before, during, and after marriage, such must be done in writing with definiteness. Such must be done and in writing to pull the "ordinary and routine" promises up to the commercial contract level. Otherwise, all "pillow talk" between spouses should remain protected from the threat, indeed the fear, of future litigation consequences, and to avoid the possibility that a spouse may find himself or herself in a legal proceeding where such intimate matters are changing into legal, binding contracts with liability and damages. This would stifle the parties' ability to talk to each other, dream, plan for the future, make decisions, adjust plans when necessary, and live out their lives according to what is in the best interest of the marital and family unit free of the ever looming threat of civil liability and potential damages.

If this Court recognizes the claims sought by Wife, marriage can be viewed legally as primarily an commercial economic venture. Parties will be forced to carefully detail their actions and obligations so as to avoid liability, thus removing any incentive to act in the best interest of the family unit. In some marriages, allowing such claims would

incentivize spouses to “cash in” by divorcing and filing for alternative civil remedies.

For some, marriage would become less desirable due to the potential lifetime payment or lump sum judgments for “damages” or “restitution” that might follow. In short, marriage would suffer immensely.

Doubtless, if Wife’s claims receive merit, litigation will multiply as divorce cases are followed by the filing of separate and additional alternative civil law suits and claims. Such multiplicity of litigation will inject greater uncertainty, stress, and contention into divorce proceedings that are already taxing parties to their emotional and financial limits. The clear trend in domestic law over the recent years has been to attempt to keep parties out of the courthouse and to give parties resources to make resolution more successful. Settlement negotiations will be complicated and compromised by the alternate theories of recovery appropriated in *Ashby*. Further, divorce cases will become more complex and involve multiple court forums, thus preventing judicial economy. For these weighty reasons, Husband urges this Court to reverse the ruling of the Court of Appeals below.

CONCLUSION

For the foregoing reasons, Petitioner, Dallen Ashby, respectfully requests that this Court reverse the Court of Appeal's ruling and hold that the civil claims raised by Respondent are unavailable when arising out of the context of a marital relationship, notwithstanding that relief may still be obtained through the parties' divorce action.

Dated: January 26, 2009.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'D. J. Hunter', written in a cursive style.

David J. Hunter
Counsel for Defendant and Petitioner

ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, no addendum is offered or necessary.

CERTIFICATE OF SERVICE

I hereby certify that I sent two (2) copies of BRIEF OF THE PETITIONER, this 27th
day of January, 2009, to:

Scott P. Card (6847)
Matthew R. Howell (6571)
FILLMORE SPENCER LLC
3301 North University Ave.
Provo, Utah 84604

Sent via:
X Hand-Delivery
 Facsimile
 Mailed (U.S. Mail, postage prepaid)
 Other _____



____ Secretary

X Attorney